No. 77-469

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

ROCCO FERRERA & Co.,
a Michigan Corporation,

Petitioner,

vs.

HAROLD MORRISON, TRUSTEE OF
ATLAS CONCRETE PIPE, INC.,
and/or ATLAS CONCRETE
CONDUIT, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the United States

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BRIEF IN OPPOSITION FOR RESPONDENT

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a bankruptcy court in an ordinary bankruptcy proceeding, which has ensued from an aborted Chapter X proceeding, has jurisdiction to render a personal judgment against an account debtor of the bankrupt where the Chapter X Trustee commenced a civil suit to collect the receivable in the United States District Court; the suit was referred to the bankruptcy judge; and the account debtor filed an answer to the complaint without contesting jurisdiction subsequent to the referral, but before the transition to straight bankruptcy.

RESPONDENT ACCEPTS THE STATEMENT OF THE CASE BY PETITIONER

ARGUMENT

A. The Propriety of the Original Reference

As the Court of Appeals correctly pointed out, the critical issue in this case involves the propriety of the reference to the bankruptcy judge by the district judge in the Chapter X proceedings of the account receivable due from Petitioner. Petitioner acknowledges that the Federal District Court in reorganization possessed the requisite jurisdiction, but denies that the bankruptcy judge had jurisdiction in the straight bankruptcy proceedings. By implication, Petitioner asserts that the bankruptcy judge did not have jurisdiction after the reference but before the transfer to straight bankruptcy.

However, despite this implication, Petitioner does not answer the reasoning of the court below that the district judge could properly refer the collection of the account receivable to the bankruptcy judge in the Chapter X proceeding. (See *Morrison, et al,* v. *Rocco, etc.,* Docket No. 76-1165, C.A. 6, 1977) Petitioner indicates that it would have objected to the jurisdiction of the bankruptcy judge in the Chapter X proceedings, but does not say on what basis.

Respondent believes that the reason for this gap in Petitioner's argument is that there is no viable argument with which to dispute the power of the district court in reorganization to refer the collection of any account receivable to the bankruptcy judge. Section 117 of the Bankruptcy Act gives broad power in this regard to the district judge; and Respondent, just as the Court of Appeals, is unable to find in the Act any language indicating that the type of matter here involved is "reserved to the judge."

B. Petitioner's "Consent" to Jurisdiction

In any event, Petitioner, by filing its answer without raising the jurisdictional question, assuming that one existed, waived any right to do so. (6 Collier, Para. 3.06 (14th Ed)) As both the Court of Appeals and the district judge noted, the burden was on Petitioner to make such objection. It must be held to be put on notice of the possibility of an order of reference being entered once it was served with a pleading in a Chapter X proceeding.

Further, Respondent believes that the Fifth Amendment — Due Process argument of Petitioner has never been formally raised before in the lower courts (although briefly mentioned in Petitioner's application for rehearing in the Court of Appeals) and, therefore, has not been expressly ruled upon. It would not be in accord with the usual policy of this court to rule on a constitutional question not previously raised and which the lower courts have not had an opportunity to determine.

Although Petitioner states that the ruling of the court below is in conflict with rulings of other circuits, the Respondent is not aware of any case cited by Petitioner which deals with the peculiar fact situation involved here, that is a consent to jurisdiction at a time when the collection of an account receivable was before the bankruptcy judge by reference and a subsequent transfer into straight bankruptcy.

It is worth noting that the new bankruptcy rules have given plenary procedures to the bankruptcy courts and there may, no doubt, be a proper case for this court to decide the effect of those rules on the traditional distinction of summary versus plenary jurisdiction. However, in this case it is clear that the decision of the Court of Appeals rested not upon any such distinction, but primarily upon the waiver and consent to jurisdiction by Respondent. Whether plenary or summary, the matter was a "proceeding" which could be referred to the bankruptcy judge and even if it were deemed plenary, he was possessed of jurisdiction by virtue of the action of Petitioner in filing an answer and counterclaim before him without objection.

Finally, under the Bankruptcy Act, the subsequent bankruptcy proceedings are deemed continuous and, as noted by the Court of Appeals, it would be a strange and illogical result for the law to require that proceedings and possibly judgments rendered under Chapter X jurisdiction be avoided in the event of an aborted reorganization and subsequent bankruptcy because independent jurisdiction in straight bankruptcy is not present. (See *Morrison, et al,* v. *Rocco, etc.,* Docket No. 76-1165, C.A. 6, 1977. See also

Matter of Wil-Low Cafeterias, Inc., 111 F2d 83 (CCA2d, 1940); and *In Re Manufacturers Trading Corp.*, 194 F2d 961 (C.A. 6th, 1952))

CONCLUSION

It is respectfully submitted that there are no proper reasons (within Rule 19 or otherwise) to support the Petition for Writ of Certiorari. The lower courts correctly disposed of the case by applying correct and well-established principles of law, and certiorari should be denied.

ROBERT L. SEGAR
Special Counsel to Trustee

DATED: October 3, 1977.